PAUL R. WATKINS (1899-1973)
DANA LATHAM (1898-1974)

CHICAGO OFFICE
SEARS TOWER, SUITE 5800
CHICAGO, ILLINOIS 60606
TELEPHONE (312) 876-7700
FAX (312) 993-9767

LONDON OFFICE
ONE ANGEL COURT
LONDON EC2R 7HJ ENGLAND
TELEPHONE + 44-171-374 4444
FAX + 44-171-374 4460

LOS ANGELES OFFICE
633 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90071-2007
TELEPHONE (213) 485-1234
FAX (213) 891-8763

MOSCOW OFFICE
113/1 LENINSKY PROSPECT, SUITE C200
MOSCOW, RUSSIA 117198
TELEPHONE + 7-503 956-5555
FAX + 7-503 956-5556

LATHAM & WATKINS
ATTORNEYS AT LAW
1001 PENNSYLVANIA AVE., N.W.
SUITE 1300
WASHINGTON, D.C. 20004-2505
TELEPHONE (202) 637-2200
FAX (202) 637-2201

NEW JERSEY OFFICE
ONE NEWARK CENTER
NEWARK, NEW JERSEY 07101-3174
TELEPHONE (201) 639-1234
FAX (201) 639-7298

NEW YORK OFFICE
885 THIRD AVENUE, SUITE 1000
NEW YORK, NEW YORK 10022-4802
TELEPHONE (212) 906-1200
FAX (212) 751-4864

ORANGE COUNTY OFFICE
650 TOWN CENTER DRIVE, SUITE 2000
COSTA MESA, CALIFORNIA 92626-1925
TELEPHONE (714) 540-1235
FAX (714) 755-8290

SAN DIEGO OFFICE
701 "B" STREET, SUITE 2100
SAN DIEGO, CALIFORNIA 92101-8197
TELEPHONE (619) 236-1234
FAX (619) 696-7419

SAN FRANCISCO OFFICE
505 MONTGOMERY STREET, SUITE 1900
SAN FRANCISCO, CALIFORNIA 94111-2562
TELEPHONE (415) 391-0600
FAX (415) 395-8095

EX PARTE OR LATE FILED

February 12, 1997

BY HAND DELIVERY

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: IB Docket No. 95-59
CS Docket 96-83
CS Docket 95-184
Notice of *Ex Parte* Communications

Dear Mr. Caton:

On Thursday, January 30, 1997, and Friday, January 31, 1997, Merrill Spiegel of Hughes Electronics Corporation and I, as counsel for DirecTV, Inc., met with the representatives of the Chairman's office, the General Counsel's office, and the Cable Services and International Bureaus identified below. At these meetings, we discussed the issues raised in the proceedings captioned above.

In particular, we urged the Commission, on reconsideration of its August 5, 1996 Order in IB Docket No. 95-59 and CS Docket 96-83 (referred to as the "OTARD" proceeding in light of the caption of section 207 of the Telecommunications Act of 1996, referring to "over-the-air reception devices"), to assert exclusive jurisdiction over all proceedings to interpret the meaning of Section 1.4000 of its rules, 47 C.F.R. § 1.4000, which preempts restrictions that

impair a viewer's ability to receive programming through certain over-the-air reception devices.[1] We acknowledged the Commission's concern that it might be required to devote administrative resources to adjudicating many cases under this rule and its belief that allowing local courts to interpret its rule will help relieve the Commission of some of this burden.

We argued, however, that the Commission will in fact suffer a *greater* administrative burden if it does *not* assert exclusive jurisdiction, because it will then be faced with inconsistent precedents from numerous local courts across the country that have no expertise in communications regulation. Under the rule of *Town of Deerfield v. FCC*, 992 F.2d 420 (2d. Cir. 1993), the Commission is not allowed to review or correct these decisions once made by the courts, no matter how much the Commission may disagree with their interpretation. The existence of inconsistent and conflicting judicial precedents will mean that there will be much more confusion among the public—thus leading to a longer period of uncertainty over the scope of the rule, with a greater number of cases to be adjudicated—than would be the case if the Commission alone were to issue a handful of clear and consistent rulings. In the long run, declining to assert exclusive jurisdiction will in fact increase the burdens on the Commission.

We then turned to the scope of Section 1.4000 of the Commission's rules. We covered two sets of issues: first, issues arising from the fact that at present the rule covers only those viewers who have an ownership interest in their property, and not those who are renters; and second, the issues that stem from application of Section 207 of the Telecommunications Act of 1996 to residents of multiple dwelling units ("MDUs").

As to the first set of issues, we noted that a condominium owner who would like to install a DBS antenna on her patio, for example, is entitled to the protection of the present rule. If the resident of the identical, adjacent unit is a renter, however, that person will not be entitled to rely on the rule's protection and may be barred by the condominium association's rules or the terms of the lease, no matter how arbitrary or unreasonable, from installing a DBS antenna identical to the one installed by his neighbor. We noted that such a result is arbitrary, invidious (because renters more often are members of minority groups and have lower household incomes than owners), and in violation of the express congressional intent of Section 207, which is designed to protect "viewers," not just "owner-viewers."

We explained that application of the rule to renters with exclusive-use areas in no way implicates the takings clause of the fifth amendment to the United States Constitution, contrary to the suggestion of certain commenters in this proceeding. Allowing a tenant to put a DBS antenna on the leased premises is not a "permanent physical occupation" of the owner's

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[1] The rule preempting governmental (as opposed to private) restrictions, which was already a compromise of the rule adopted earlier this year in Section 25.104, has not been challenged by any governmental party.

property, which the owner has already granted the tenant the right to use. Therefore, the protections of the rule should be extended to all viewers, whether they are owners or renters.[2]

Turning to the second set of issues, we pointed out that many MDU residents do not in fact have access to patios or balconies suitable for the placement of a DBS antenna. In such cases, restrictions contained in a deed or lease or in the rules of a condominium association that prohibit a resident from going up on the rooftop to place a DBS antenna and running wires to the resident's unit are in fact restrictions that impair that viewer's ability to receive DBS programming.

Nevertheless, we did not advocate that all residents be empowered to place their DBS antennas on rooftops, building walls, or other common areas. Instead, as a more modest measure that would balance the concerns and rights of property owners against the clear congressional mandate, we urged the Commission to require that all MDU property owners make available to their residents at least one Section 207 over-the-air service (typically in addition to the existing hard-wired cable service). We emphasized that under our approach, no third party—neither a resident nor a service provider—would have any right to go onto any part of the owner's property (outside the "exclusive use" areas that a resident is already entitled to use pursuant to lease or deed). The owner alone would decide what service to provide and where and how to provide it. The owner could itself purchase and install an antenna, or could contract with a third party to own or install the equipment. These decisions would be left entirely up to the owner, just as the owner now decides about the ownership and installation of smoke detector equipment and other government-mandated furnishings for residents. Because the Commission would not be forcing any owner to allow any other person or thing onto the owner's property, there would be no "permanent physical occupation" and consequently no fifth amendment taking concerns. (The owner would not be deprived of all economic use of its property; indeed, these services would likely be enhancements to the value of the property. It is also possible for a building owner to enter into agreements with the providers or packagers of these services in ways that would provide additional sources of revenue to the owner.)

We recognized that it would be desirable to require an owner to make available any Section 207 over-the-air service that is requested by any resident, an approach that we know is advocated by some, and one that DirecTV supports. We acknowledged, however, that there is a concern on the part of building owners that there might be a multiplicity of antenna structures on building rooftops, raising both aesthetic and practical concerns. We believe that these concerns are misguided because: (i) there will be only a few very small dishes needed to access all the DBS services that will ever be available; (ii) there is virtually never more than one wireless cable system in a market; and (iii) a single broadcast antenna is invariably sufficient for the receipt of over-the-air broadcast television. Nevertheless, we stated that DirecTV would be willing to

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[2] We may have created the misimpression that the current rule provides protection to a viewer if he or she is *either* an owner *or* has an exclusive-use area. In fact, however, the current rule provides protection only to those with both an ownership interest in, and access to, an exclusive-use area.

live with the compromise approach identified above, requiring the owner to provide at least one over-the-air service. We believe that by "opening the door" to competition in this fashion, owners will in many cases end up providing several competing services to their residents; even where only a single additional service is offered, the provision of that service will further the congressional and Commission objective of enhancing the competitive marketplace.

Finally, we acknowledged that, in many cases, building owners are currently unable to provide a competitive service, even if they desire to do so, because of long-term exclusive contracts entered into between the building owner and the local cable company, typically at times when DBS was a nascent or even nonexistent service. The exclusive dealing provisions in those contracts are also restrictions that impair a viewer's ability to receive programming through over-the-air reception devices within the meaning of Section 207. We urged the Commission to strike down exclusive dealing provisions in all contracts with hard-wired cable companies, so that all owners would be free to negotiate with alternate providers (regardless of what rule the Commission adopts with respect to requiring owners to provide such services to their residents). Congress and the Commission have noted repeatedly the market power of cable, and the Commission should not permit the use of that market power to extract exclusive dealing clauses from building owners. In contrast, we noted, none of the over-the-air services has market power, so there is no need for the Commission to prohibit exclusive dealing clauses by the over-the-air providers; there is ample precedent to support the notion that exclusive dealing clauses by those lacking market power can in fact serve to enhance, rather than diminish, competition.

We also discussed the relationship between the OTARD proceeding and the inside wiring proceeding, CS Docket No. 95-184. A successful result in the OTARD proceeding will get competitive providers as far as the MDU rooftop; appropriate rules in the inside wiring proceeding are needed to ensure that they can effectively reach each resident's unit. DirecTV has previously advocated the establishment of a number of additional broadband demarcation points. We advocated, at a minimum, the establishment of a demarcation point at the existing cable lockbox or other location where wiring is first dedicated to an individual unit, so that alternate providers will be able to access the "home run" wiring. In that fashion, a resident could easily elect to change to a competitive service. The requirement of a "neutral" lockbox, advocated by some cable companies, is entirely unnecessary and would be far more invasive of a building owner's property than giving competitive providers access to the existing lockbox.

Very truly yours,

James F. Rogers
of LATHAM & WATKINS

cc: William E. Kennard, General Counsel
Stephen A. Bailey, General Counsel's Office
Julius Genachowski, Chief Counsel, Chairman Hundt's Office
William H. Johnson, Deputy Chief, Cable Services Bureau
JoAnn Lucanik, Chief, Policy & Rules Division, Cable Services Bureau
Rick C. Chessen, Assistant Chief, Policy & Rules Division, Cable Services Bureau
Darryl Cooper, Consumer Protection Division, Cable Services Bureau
Allen K. Manuel, Cable Services Bureau
Donna Jean Ward, International Bureau
Dan Connors, International Bureau
Merrill Spiegel, Hughes Electronics Corporation